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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

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LEO AVITIA,

Petitioner,

v.

THE SUPERIOR COURT OF SAN JOAQUIN  
COUNTY,

Respondent;

THE PEOPLE,

Real Party in Interest.

C082859

(Super. Ct. No.  
STKCRFE2016881,  
GJ20164112415)

Petitioner Leo Avitia seeks extraordinary writ relief from the trial court's order denying his Penal Code section 995 motion to dismiss the indictment charging him with second degree murder and other offenses.<sup>1</sup> The motion was based on the deputy district

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<sup>1</sup> Undesignated statutory references are to the Penal Code.

attorney's dismissal of a grand juror for bias outside of the presence of the other grand jurors. The People concede the deputy district attorney's dismissal of the grand juror was legal error. Therefore, the question presented by this petition is whether that error required the trial court to grant petitioner's motion to dismiss. On the record presented in this case, we conclude the deputy district attorney's error was not structural, and petitioner has failed to demonstrate he was denied a substantial right or that the error substantially impaired the independence and impartiality of the grand jury. Accordingly, while the prosecutor's violation of statutory requirements is troubling, the trial court's decision to deny petitioner's motion was not error, and we shall deny his petition for writ of mandate.

## **I. BACKGROUND**

### **A. *Grand Jury Proceedings***

On July 22, 2014, the San Joaquin County District Attorney's Office filed a complaint charging petitioner with second degree murder; gross vehicular manslaughter while intoxicated; driving under the influence of alcohol and drugs and causing bodily injury; driving with 0.08 percent or more, by weight, of alcohol in his blood and causing bodily injury; resisting an executive officer; and driving while his license was revoked or suspended due to a driving under the influence conviction. The complaint also alleged that petitioner had suffered two prior convictions for driving with 0.08 percent or more, by weight, of alcohol in his blood on December 16, 2013, and March 25, 2014, respectively. The complaint further alleged infliction of great bodily injury.

On January 8, 2016, nineteen grand jurors and four alternate grand jurors were selected and sworn in by the superior court. On January 11, 2016, Deputy District Attorney Frank Kooger appeared before them. The partial transcript of these proceedings contained in the record reflects that the deputy district attorney asked the jurors about their ability to be impartial: "I'm asking if anybody here, after listening to the charges, or listening to the witnesses, has the state of mind which will prevent him or her from acting

impartially and without prejudice to the substantial rights of parties.” The grand jury foreperson and Juror No. 18 both responded. Juror No. 18 said, “I’ve arrested people for [section] 148.”<sup>2</sup>

The deputy district attorney then said, “everyone is going to get out of the jury room and we’re going to talk to Juror Number 6, the jury foreman.” After the foreman said he could follow the law despite his religious and moral opposition to drinking alcohol, the deputy district attorney asked the foreman to wait outside.

Then, the deputy district attorney had this exchange with Juror No. 18:

“BY MR. KOOGER: Q. You had—Juror Number 18, you stated that you may have some issues?

“A. Correct. I am a peace officer. I work for the Department of Alcohol Beverage Control, and I have arrested subjects for [section] 148[.]

“Q. Aren’t you exempt from jury duty?

“A. I’m not. I’m [section] 830.2. We don’t follow the exemption.

“Q. The fact that you’ve arrested people for—the fact you’ve arrested people—hold on just one second.

“A. Sure.”

The petition represents that the exchange continues as follows, but no corresponding record was provided:<sup>3</sup>

“Q. The fact that you arrested people for resisting arrest before, do you think that’s going to affect your impartiality in this case?

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<sup>2</sup> Section 148 applies to individuals who willfully resist, delay or obstruct a public officer, peace officer or emergency medical technician.

<sup>3</sup> The People concede this account is consistent with the account provided by the deputy district attorney in his opposition to petitioner’s motion to dismiss and respondent’s factual summary in its ruling.

“A. Yes.

“Q. You do?

“A. I do, in addition to the fact that I’m currently conducting an investigation that’s very similar to these charges.

“Q. So you don’t think you can be fair?

“A. No, I don’t think so.

“Q. What I’m going to ask you to do is go down to the basement, let them know that you were excused.”

The proceedings apparently resumed before the remaining grand jurors and alternates. Three days later, the grand jury returned an indictment. The indictment included the offenses and allegations that appeared in the complaint, and also a charge of vehicular manslaughter while intoxicated based on ordinary negligence.

*B. Motion to Dismiss the Indictment*

After pleading not guilty as to all counts and denying all of the enhancement allegations, petitioner filed a nonstatutory motion to dismiss the indictment. The court later agreed to consider the motion as though it were made under section 995.

Petitioner argued the deputy district attorney’s dismissal of a grand juror in violation of section 939.5 interfered with the jury’s independence and resulted in an improperly constituted grand jury. Petitioner asserted that because he was denied an independent jury “free from prosecutorial bias and undue influence” from the outset of the proceedings, his substantial rights were violated and the indictment should be dismissed even in the absence of a showing of prejudice.

The trial court denied the motion to set aside the indictment in a written ruling filed on July 29, 2016. Given the relevance to the issues presented in this petition, we include a significant portion of the trial court’s ruling. The court began by addressing petitioner’s claims regarding the impact of the prosecutor’s actions on the mindset of the panel:

“In *Packer v. Superior Court* (2011) 201 [Cal.App.4th] 152, at page 166 [(*Packer*)], the Court recited that federal law is unsettled on whether a defendant has a right to an unbiased grand jury under the due process clause of the federal Constitution. As for California law on that point, the Court wrote as follows:

“Although California law is similarly unresolved, our Supreme Court ‘has recognized that the manner in which the grand jury proceedings are conducted may result in a denial of a defendant’s due process rights, requiring dismissal of the indictment. [Citation.]’ [Citation.] The court has also stated that the determination whether a defendant’s due process rights have been violated in this regard ultimately depends on whether the error at issue ‘substantially impaired the independence and impartiality of the grand jury.’ [Citation.] The court has also spoken of the need to ensure that the grand jury acts ‘independently of the prosecutor or judge.’ [Citation.] [(*Packer, supra*, 201 Cal.App.4th] at p. 167.)

“First, there is no evidence of defendant’s assertions that the prosecutor’s actions ‘impacted the mindset of the panel’ and led it ‘to incorrectly believe that [the prosecutor’s] judgment is ultimately what controls the operation and functions of the grand jury.’ His arguments are speculative and unsupported by the record. They fall in the category of being theoretically possible, but nothing more. On this issue, the defendant concedes the point when he writes, ‘There is no exact way to know how the grand jury was affected . . .’ [Citation.]

“Moreover, the other grand jurors initially heard the foreperson (No. 6) and Juror No. 18 say that they may each have an issue regarding their abilities to be impartial. [Citation.] Thereafter, the prosecutor had all of the grand jurors leave the grand jury room except for the foreperson. After questioning the foreperson and essentially directing him to remain on the grand jury, the prosecutor questioned Juror No. 18 alone, and instructed her to retire. The remainder of the grand jurors did not see or hear either *voir dire* process, but they did eventually learn that the foreperson remained on the jury, but that Juror No. 18 did not. The other members did not witness the prosecutor instruct Juror No. 18 to retire. Thus, with one grand juror staying on the jury and another leaving,

the remaining grand jurors reasonably would have concluded that Juror No. 18 needed to be excused due to a bias or impartiality.

“Second, there is no California authority for the proposition that a violation of [section] 939.5 requires a per se finding of a due process violation. In [*Packer, supra*,] 201 [Cal.App.4th] at page 169, the Court wrote as follows:

“Ultimately, we need not decide whether Packer had a due process right to an unbiased grand jury because he fails to demonstrate that Juror No. 2 was actually biased. [Citations.] Even those Courts that have recognized a defendant’s due process right to challenge an indictment on the ground of grand juror bias have concluded that the defendant ‘bears a heavy burden of showing actual bias and prejudice.’ [Citations.] Bias cannot be presumed. [Citation.]

“In the instant case, as in *Packer*, the defendant has not met the heavy burden of showing actual bias and prejudice. Here the prosecutor instructed grand Juror No. 18 that she must retire because she twice stated, under questioning, that she could not be fair to the defendant. [Citation.] Though the foreperson should have been the one who instructed the grand juror to retire pursuant to [] section 939.5, a point the prosecutor readily and appropriately acknowledged during the hearing on the motion to dismiss, Juror No. 18 needed to retire from the grand jury nevertheless. . . . Accordingly, as in *Packer*, this court likewise need not decide whether the defendant had a due process right to an unbiased grand jury because the defendant fails to establish that any of the grand jurors was actually biased.

“What impact the prosecutor’s dismissal of Juror No. 18 had, if any, on the remainder of the members is simply unknown. In that vein, and on the record in this case, ‘absent a showing by defendant[] that the district attorney’s activities in fact coerced the grand jurors or that they were in fact prejudiced, the [defendant’s argument that the jurors were pressured to submit to the prosecutor’s will] is unpersuasive.’ [Citation.] This court will note, that if the prosecutor’s dismissal of Juror No. 18 had any

impact on the grand jury, it leans in favor of having produced an unbiased and impartial grand jury.

“For the reasons set forth above, the court also concludes that the defendant has not shown that the prosecutor’s dismissal of Juror No. 18 denied the defendant a substantial right. [Citation.] The defendant has not shown that the error reasonably might have affected the outcome of the grand jury proceedings.”

The court also rejected petitioner’s argument that dismissal was required because the separation of the judicial and executive branches of government was violated: “Here, the grand jury was properly constituted and had the jurisdiction and authority to issue its indictment. The prosecutor, though ‘retiring’ a grand juror when the foreperson should have done so, did not cause prejudice to the defendant. The prosecutor precluded a grand juror, who acknowledged she could not be fair in the matter, from influencing other grand jurors during deliberations and from voting on whether to indict the defendant. And, as concluded above, the court cannot on this record find that the prosecutor manipulated the grand jury in a way that deprived it of its independence and impartiality.”

Petitioner sought review in this court by filing a petition for writ of mandate or prohibition and requesting a stay of his October 14, 2016, trial date.

On October 13, 2016, we issued an order to show cause why the relief prayed for in this proceeding should not be granted and issued a stay of all further proceedings, including the trial. The People filed a return by demurrer.

## **II. DISCUSSION**

### **A. *The Grand Jury Process***

In the prosecution of a felony, the People may proceed either by indictment or information. (Cal. Const., art. I, § 14; §§ 682, 737.) “An indictment is an accusation in writing, presented by the grand jury to a competent court, charging a person with a public offense.” (§ 889.) “Thus, under the statutory scheme, it is the grand jury’s function to determine whether probable cause exists to accuse a defendant of a particular crime.”

(*Cummiskey v. Superior Court* (1992) 3 Cal.4th 1018, 1026.) “Prior to the authorization of informations, the chief function of the grand jury was to hear evidence of felonies and to bring indictments.” (4 Witkin & Epstein, Cal. Criminal Law (4th ed. 2012) Introduction to Criminal Procedure, § 33, p. 58.) While this is no longer so, in determining whether probable cause exists to accuse a defendant of a particular crime, “[t]he grand jury’s ‘historic role as a protective bulwark standing solidly between the ordinary citizen and an overzealous prosecutor’ [citation] is as well-established in California as it is in the federal system.” (*Johnson v. Superior Court* (1975) 15 Cal.3d 248, 253-254.)

“Although the grand jury was originally derived from the common law, the California Legislature has codified extensive rules defining it and governing its formation and proceedings, including provisions for implementing the long-established tradition of grand jury secrecy.” (*Daily Journal Corp. v. Superior Court* (1999) 20 Cal.4th 1117, 1122.) “A grand jury is a body of the required number of persons returned from the citizens of the county before a court of competent jurisdiction, and sworn to inquire of public offenses committed or triable within the county.” (§ 888.) “Under the California Constitution, article I, section 23, ‘One or more grand juries shall be drawn and summoned at least once a year in each county.’ (See also §§ 904, 905.) After the names of the grand jury are drawn and the jury is summoned (§ 906), it is sworn pursuant to the oath contained in section 911, and then is ‘charged by the court’ (§ 914).”<sup>4</sup> (*Cummiskey v. Superior Court, supra*, 3 Cal.4th at p. 1024.) The court also appoints the foreman of the grand jury. (§ 912.)

Of particular relevance to this petition, the Penal Code expressly provides that the foreman of the grand jury is responsible for directing those that cannot be impartial to

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<sup>4</sup> It appears this case involves the impanelment of an “additional grand jury” under section 904.6 specifically impaneled to hear criminal matters.



retire from jury service: “Before considering a charge against any person, the foreman of the grand jury shall state to those present the matter to be considered and the person to be charged with an offense in connection therewith. He shall direct any member of the grand jury who has a state of mind in reference to the case or to either party which will prevent him from acting impartially and without prejudice to the substantial rights of the party to retire. Any violation of this section by the foreman or any member of the grand jury is punishable by the court as a contempt.” (§ 939.5.) The district attorney may appear before the grand jury to give “information or advice” (§ 935), but may not excuse jurors unilaterally: “No challenge shall be made or allowed to the panel from which the grand jury is drawn, nor to an individual grand juror, except when made by the court for want of qualification, as prescribed in Section 909.” (§ 910.)

*B. Grounds for Challenging an Indictment*

*1. Not Found, Endorsed, and Presented as Prescribed in the Penal Code*

Petitioner contends the deputy district attorney’s dismissal of Juror No. 18 resulted in an indictment that was “not found, endorsed, and presented as prescribed in” the Penal Code. (§ 995, subd. (a)(1)(A).) This language originates from section 995, subdivision (a), which sets forth the grounds for granting a motion to set aside an indictment or information. The grounds for setting aside an indictment and an information are not identical. They are:

“(1) If it is an indictment:

(A) Where it is not found, endorsed, and presented as prescribed in [the penal] code.

(B) That the defendant has been indicted without reasonable or probable cause.

(2) If it is an information:

(A) That before the filing thereof the defendant had not been legally committed by a magistrate.

(B) That the defendant had been committed without reasonable or probable cause.” (§ 995, subd. (a)(1)-(2).)

Our Supreme Court has stated that the requirement that an indictment must be set aside “ ‘[w]here it is not found, endorsed, and presented as prescribed in [the penal] code’ ” (*People v. Jefferson* (1956) 47 Cal.2d 438, 441) “has been interpreted as applying only to those sections in part 2, title 5, chapter 1, of the Penal Code beginning with section 940” (*id.* at p. 442; accord *Stark v. Superior Court* (2011) 52 Cal.4th 368, 416, fn. 24 (*Stark*)). This construction excludes the deputy district attorney’s violations in this case of sections 910 and 939.5 as a basis for setting aside an indictment under section 995, subdivision (a)(1)(A). And based on this interpretation, it is settled law that the *foreperson’s* failure to direct a biased or prejudiced juror to retire as required by section 939.5 is not a ground for setting aside an indictment. (*People v. Jefferson, supra*, at p. 442 [interpreting former § 907, now § 939.5].) We find no principled basis to conclude that a prosecutor’s excusal of a juror for bias relates to whether an indictment was “found, endorsed, and presented as prescribed in this code” but a foreperson’s failure to excuse a juror for bias does not. Therefore, section 995, subdivision (a)(1)(A) was not the proper vehicle for petitioner’s claim.

## 2. *Denial of Due Process Rights*

Petitioner also asserts the dismissal of Juror No. 18 deprived him of an independent, properly constituted grand jury in violation of his due process rights. An indictment must be dismissed if the manner in which the grand jury proceedings were conducted resulted in a denial of the defendant’s due process rights. (*Stark, supra*, 52 Cal.4th at p. 417.) And “due process rights might be violated if the grand jury proceedings are conducted in such a way as to compromise the grand jury’s ability to act independently and impartially.” (*People v. Thorbourn* (2004) 121 Cal.App.4th 1083, 1089.) When a defendant is indicted by a grand jury that was not acting independently and impartially, some courts have explained that the defendant may raise a challenge

under section 995, subdivision (a)(1)(B) “to the probable cause determination underlying the indictment, based on the nature and extent of the evidence and the manner in which the proceedings were conducted by the district attorney.” (*People v. Superior Court (Mouchaourab)* (2000) 78 Cal.App.4th 403, 424-425; accord *Dustin v. Superior Court* (2002) 99 Cal.App.4th 1311, 1320 (*Dustin*).) Regardless of whether due process challenges are raised under section 995 or through a nonstatutory motion, petitioner has properly raised a due process challenge to the indictment, and we will now turn to the question of whether it was correctly denied.

*C. Evaluating a Due Process Challenge to an Indictment*

At the outset, we must analyze the appropriate standard for reviewing the due process challenge raised by petitioner. Case law suggests two parallel standards:

(1) Whether the error substantially impaired the independence and impartiality of the grand jury, or (2) whether the error constituted the denial of a substantial right.

*1. Whether the Error Substantially Impaired the Independence and Impartiality of the Grand Jury*

When a due process challenge is raised to the manner in which the grand jury proceedings were conducted, courts have explained that, “the determination whether a defendant’s due process rights have been violated in this regard ultimately depends on whether the error at issue ‘substantially impaired the independence and impartiality of the grand jury.’ ” (*Packer, supra*, 201 Cal.App.4th at p. 167; see also *Stark, supra*, 52 Cal.4th at p. 417 [“That showing requires a demonstration that the prosecutor suffered from a conflict of interest that substantially impaired the independence and impartiality of the grand jury”].) In *Packer*, the defendant sought extraordinary writ relief from the trial court’s order denying his section 995 motion to dismiss an indictment on the ground of grand juror bias. (*Packer, supra*, at p. 156.) He alleged one of the grand jurors was inherently biased against him because of her employment and alleged membership in the prosecution team. (*Id.* at p. 158.) Petitioner claims *Packer* is inapplicable because he

does not allege the grand jury was biased. But petitioner overlooks the point that our Supreme Court has consistently analyzed the merits of a due process claim arising out of grand jury proceedings in terms of whether there was a substantial impairment: “ ‘[A]ny prosecutorial manipulation which *substantially impairs* the grand jury’s ability to reject charges which it may believe unfounded is an invasion of the defendant’s constitutional right.’ ” (*People v. Backus* (1979) 23 Cal.3d 360, 392, italics added; see also *Stark, supra*, 52 Cal.4th at p. 417.) The trial court reasoned that it could not “on this record find that the prosecutor manipulated the grand jury in a way that deprived it of its independence and impartiality.” Failure to show a substantial impairment of the jury’s independence and impartiality was the primary basis for the trial court’s denial of petitioner’s motion.

2. *Whether the Error Constituted the Violation of a Substantial Right*

Petitioner seeks to avoid the question of whether there was a substantial impairment of the jury’s independence and impartiality by making an argument borrowed from motions to set aside an *information*. Specifically, he asserts that because his pretrial writ petition arises from irregularities in the grand jury proceeding that resulted in a violation of his substantial rights, he did not need to demonstrate prejudice (or, implicitly, a substantial impairment of the independence or impartiality of the grand jury) to obtain dismissal of the indictment. The People argue petitioner was not denied a substantial right.

In the context of a motion to set aside an *information* under section 995, subdivision (a)(2)(A), on the ground that the defendant was not legally committed by the magistrate, “[i]t is settled that denial of a *substantial right* at the preliminary examination renders the ensuing commitment illegal and entitles a defendant to dismissal of the *information* on timely motion.” (*People v. Pompa-Ortiz* (1980) 27 Cal.3d 519, 523 (*Pompa-Ortiz*), italics added.) In *Pompa-Ortiz*, the defendant moved to set aside an *information* on the ground that he had not been legally committed because he was denied

his right to a public preliminary examination. (*Id.* at pp. 522-523.) When the motion was denied, he did not seek review by extraordinary writ. (*Id.* at p. 523.) Our Supreme Court reviewed the issue on direct appeal, and affirmed the judgment because defendant made “no showing he was denied a fair trial or otherwise suffered prejudice from the closure of the preliminary examination.” (*Id.* at p. 530.) The court held that “[t]he right to relief without any showing of prejudice will be limited to pretrial challenges of irregularities.” (*Id.* at p. 529.) Only when the issue is raised in a pretrial challenge is prejudice presumed and the information dismissed. (*Ibid.*) Petitioner attempts to invoke this presumption of prejudice on the basis that his challenge reaches us on an extraordinary writ.

This case, however, involves a grand jury indictment that is “governed by section 995, subdivision (a)(1), which omits the ‘legally committed’ language.” (*Stark, supra*, 52 Cal.4th at p. 416.) Whether the substantial right analysis applies to petitioner’s claim to potentially obviate the need for showing prejudice in his pretrial challenge to his indictment is less settled than the parties assume. After *Pompa-Ortiz*, our Supreme Court reviewed a due process challenge to an indictment in the context of a pre-trial petition for writ of mandate or prohibition with no mention of the substantial rights analysis. (*Stark, supra*, 52 Cal.4th at pp. 378-379, 417.) Instead, it held the petitioner failed to “demonstrat[e] that the prosecutor suffered from a conflict of interest that substantially impaired the independence and impartiality of the grand jury.” (*Id.* at p. 417.)<sup>5</sup> Before and after this decision, the Supreme Court rejected *post*-conviction challenges to irregularities in grand jury proceedings that did not make a showing of prejudice as required under *Pompa-Ortiz*. (*People v. Houston* (2012) 54 Cal.4th 1186, 1205 [incomplete transcript of grand jury proceedings].) It has never addressed whether a presumption of prejudice may apply to a pretrial due process challenge to an indictment.

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<sup>5</sup> Petitioner does not expressly attempt to distinguish *Stark*.

In fact, it has specifically declined to address whether an intermediate appellate court correctly applied a presumption of prejudice to a pretrial challenge to an indictment. (See *People v. Houston*, *supra*, at p. 1205 [“We need not address the Attorney General’s concerns about *Dustin* because defendant’s reliance on it is misplaced”].) Consequently, it is unclear whether a substantial rights analysis with a presumption of prejudice applies to—either instead of or alongside—the question of whether the deputy district attorney’s error substantially impaired the independence and impartiality of the grand jury.

*D. The Trial Court Properly Denied Petitioner’s Motion to Dismiss*

*1. Petitioner Did Not Demonstrate Substantial Impairment of the Independence and Impartiality of the Grand Jury or Violation of a Substantial Right*

Ultimately, we conclude it does not matter which analysis is used because, as we will discuss, neither standard was met. With respect to a substantial rights analysis, our Supreme Court has explained that, “Although some errors such as denial of the right to counsel by their nature constitute a denial of a substantial right, . . . generally a denial of substantial rights occurs only if the error ‘reasonably might have affected the outcome.’ ” (*People v. Standish* (2006) 38 Cal.4th 858, 882 (*Standish*).)<sup>6</sup> We reject petitioner’s claim that the deputy district attorney’s conduct constituted the type of error that by its nature constitutes the denial of a substantial right. In *Standish*, the court held that a failure to grant the defendant release from custody on his own recognizance “pending the preliminary examination in violation of section 859b constitutes an error subject to the general test for prejudice because, unlike the absence of counsel, for example, the error is not inherently prejudicial. The error does not implicate a core right *at the preliminary*

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<sup>6</sup> Our Supreme Court elaborated further: “By this language, we do not mean that the defendant must demonstrate that it is reasonably *probable* he or she would not have been held to answer in the absence of the error. Rather, the defendant’s substantial rights are violated when the error is not minor but ‘reasonably *might* have affected the outcome’ in the particular case.” (*Standish*, *supra*, 38 Cal.4th at pp. 882-883.)

*examination itself.* In addition, the error is not one for which the pertinent statute itself calls for dismissal . . . .” (*Id.* at p. 883.) Even assuming for discussion that the substantial rights analysis can be applied in a due process challenge to an indictment, these points are equally true here. A district attorney’s dismissal of a biased juror outside the presence of the other jurors is, without more, not inherently prejudicial. While the foreman must dismiss biased jurors instead of the district attorney, this is not a core right analogous to the right to counsel. Lastly, neither section 910 nor 939.5 specifies any relief for a violation by the deputy district attorney, and section 995 does not list this as a ground for setting aside an indictment. We are not persuaded that the deputy district attorney’s error here was one that constitutes a denial of a substantial right without any inquiry into whether it reasonably might have impacted the outcome of the proceedings.

Furthermore, we agree with the trial court’s conclusion that petitioner neither satisfied this standard nor demonstrated that the error substantially impaired the independence and impartiality of the grand jury. The deputy district attorney’s actions did not “inevitably create[] and foster[] the false impression that the grand jury was operating under his scrutiny and control.” It is critical to our conclusion that Juror No. 18 was excused outside of the presence of the other grand jurors. Petitioner speculates that, if the correct procedure were followed, the foreperson may have attempted to rehabilitate the juror. Even if this were true, if the foreman was not successful, the juror’s excusal would have remained mandatory. (§ 939.5.) There is no evidence the deputy district attorney’s actions changed the composition of the jury in any manner other than that which was already inevitable. There is also no evidence the other jurors knew Juror No. 18 had been instructed to leave. They could only guess what the deputy district attorney said or did (if anything) that led to the disappearance of their fellow juror. On this record, the trial court did not err in concluding the prosecutor’s actions did not deny petitioner a substantial right or substantially impair the independence and impartiality of the grand jury.

Unlike petitioner, we also find the error alleged in this case distinguishable from the one committed in *Dustin, supra*, 99 Cal.App.4th 1311. There, the court of appeal issued a preemptory writ of mandate directing the superior court to enter an order granting defendant's pretrial motion to dismiss an indictment despite no showing of prejudice. (*Id.* at p. 1328.) In this death penalty case, "the prosecutor affirmatively ordered the court reporter to leave while he made his opening and closing statements before the grand jurors. When asked why he did so, the prosecutor basically replied that this is how grand jury proceedings are conducted in Stanislaus County." (*Id.* at p. 1314.) Based on this irregularity, the defendant filed a section 995 motion on the ground that the prosecutor denied him due process; the trial court denied the motion. (*Dustin, supra*, at p. 1315.) The court of appeal issued an order to show cause to respondent court why petitioner was not entitled to a complete transcript of the grand jury proceeding, and if so, whether dismissal of the indictment was an appropriate remedy for a violation of the right. (*Id.* at p. 1318.) As to the first question, the court of appeal concluded the petitioner was entitled to a complete transcript of the entire grand jury proceeding. (*Id.* at p. 1323.) It explained that a challenge to an indictment under section 995 for lack of probable cause " 'could include a claim that the state of the evidence, "under the instructions and advice given by the prosecutor," compromised the grand jury's ability to reach a determination independently and impartially.' " (*Dustin, supra*, at p. 1320.) Therefore, the prosecutor's actions "not only violated defendant's rights under the statutory scheme, but also precluded any effective review of the prosecutor's comments by the trial court. It seems inescapable that the prosecutor's exclusion of the court reporter was done for the express purpose of precluding discovery by the defendant of his opening statement and closing argument." (*Id.* at p. 1323.) As to the question of the appropriate remedy, the People argued the error was subject to a harmless error analysis. (*Id.* at p. 1325.) The court of appeal disagreed: "This case is more analogous to a violation of a substantial right at a preliminary hearing." (*Ibid.*) It observed that, "[i]n



the absence of a transcript, coupled with the fact that no judge or defense representative was present, it is difficult to imagine how a defendant could ever show prejudice.” (*Id.* at p. 1326.) Moreover, it explained “the intentional failure to record the proceedings as mandated by statute in death penalty cases resulted in the denial of ‘a substantial right,’ i.e., the ability to raise prosecutorial misconduct and to receive meaningful review of any alleged error.” (*Ibid.*) As a result, prejudice was presumed under *Pompa-Ortiz*. (*Dustin, supra*, at p. 1326.) Here, petitioner asserts “there is no means by which to adduce what influence the improperly dismissed juror may have had on deliberations,” and therefore we should dismiss the indictment without any showing of prejudice. We are not persuaded. Unlike the facts in *Dustin*, here the deputy district attorney’s dismissal of an admittedly biased grand juror did not preclude petitioner from making a showing of prejudice, nor did it prevent this court from engaging in meaningful review. We will not presume prejudice where petitioner has failed to make any showing.

Notwithstanding our conclusion in this case, we are compelled to caution that the district attorney’s actions were illegal and under different circumstances could substantially impair the grand jury’s understanding of its independence and result in the violation of a substantial right.

## 2. *No Structural Error*

Petitioner similarly contends that even if he is required to show prejudice here, he satisfied the requirement because there was structural error. He relies on *Moon v. Superior Court* (2005) 134 Cal.App.4th 1521 (*Moon*), in which the court of appeal issued a preemptory writ of mandate directing the superior court to enter a new order granting the petitioner’s section 995 motion to set aside an information on the basis that the defendant was not legally committed by the magistrate who had erred in denying his request for self-representation. (*Moon, supra*, at pp. 1531, 1535.) We find this case distinguishable, and a more recent Supreme Court decision rejecting a claim of structural error instructive: “Under federal law, as under state law, irregularities in grand jury

proceedings are generally subject to analysis for prejudice. [Citation.] Nonetheless, the Supreme Court has acknowledged that there are ‘isolated exceptions to the harmless error rule’ involving cases where the error is of constitutional magnitude and ‘the structural protections of the grand jury have been so compromised as to render the proceedings fundamentally unfair, allowing the presumption of prejudice.’ [Citation.] In *Vasquez [v. Hillery]* (1986) 474 U.S. 254 [88 L.Ed.2d 598], racial discrimination in the composition of the jury that indicted the defendant led the court to reverse his conviction without reference to prejudice.” (*People v. Jablonski* (2006) 37 Cal.4th 774, 800.) Here, the deputy district attorney’s actions did not render the proceedings fundamentally unfair or “have a structural impact on those proceedings comparable to that of discriminatory selection of grand jurors, nor is such error insusceptible of review for actual prejudice such that prejudice must be presumed.” (*Id.* at p. 801.) Therefore, on the narrow factual record presented in this case, there was no structural error and the improper recusal of a biased grand juror by the deputy district attorney, rather than the foreman, does not necessitate the dismissal of the indictment.

### 3. *The Grand Jury Was Properly Constituted*

We also reject petitioner’s assertion that the grand jury was not properly constituted. This case is distinguishable from *Bruner v. Superior Court* (1891) 92 Cal. 239 (*Bruner*) and other decisions in which an unauthorized individual selected the members of the grand jury. (See, e.g., *De Leon v. Hartley* (N.M. 2013) 316 P.3d 896, 899 [holding that permitting district attorney to take over the court’s role of deciding who shall serve as grand jurors “is to sacrifice any perception that the grand jury is an entity distinct from the prosecutor that is capable of serving as a barrier against unwarranted accusations”].) In *Bruner*, the trial court improperly appointed an individual to summon grand jurors instead of the sheriff. (*Bruner, supra*, at pp. 241-242, 251.) The court held the grand jury was not a legal or valid one, and lacked jurisdiction. (*Id.* at p. 256.) Here, the fact the juror at issue was excused by the deputy district attorney instead of the jury

foreman does not make the grand jury that was formed illegal or the indictment that it returned void. (See *id.* at p. 252.) This distinction between jurisdictional defects and other errors was underscored in *Fitts v. Superior Court of Los Angeles County* (1935) 4 Cal.2d 514, in which certain indictments were claimed to be void because, among other allegations, the grand jury list was not prepared in substantial compliance with the law and the judges' bias denied the defendants equal protection of the laws and due process of law in violation of the state and federal constitutions. (*Id.* at pp. 517-518.) Our Supreme Court rejected these claims: "We are not to be understood as condoning or approving the above enumerated methods and practices alleged to have been resorted to in the impanelment of the grand jury. It is our view that such practices . . . would not affect the jurisdiction of the respondent court to try the petitioners thereon." (*Id.* at p. 520.) "Mere irregularities, as distinguished from jurisdictional defects, occurring in the formation of a grand jury will not justify a court declaring an indictment a nullity. [Citation.] The true distinction lies between the acts of a body having no semblance of authority to act, and of a body which, though not strictly regular in its organization, is, nevertheless, acting under a color of authority." (*Id.* at p. 521.) While the deputy district attorney's actions in this case violated the Penal Code, they did not—on the facts presented here—rise to the level of creating a jurisdictional defect.

### III. DISPOSITION

Our prior stay of proceedings in the trial court is lifted. The petition for writ of mandate is denied.

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RENNER, J.

We concur:

/S/

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BUTZ, Acting P. J.

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DUARTE, J.